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219-652—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1277

JOSEPH ABRAMS AND RICHLAND SECURITIES, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. O 1–22) is reported at 357 F. 2d 539. Opinions of the district court in the case appear at 35 F.R.D. 529 and 29 F.R.D. 178.

JURISDICTION

The judgment of the court of appeals was entered March 4, 1966. On March 22, 1966, Mr. Justice Harlan extended the time to file a petition for a writ of certiorari to May 3, 1966, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner Abrams acquired immunity from prosecution by virtue of the fact that, after having claimed the privilege against self-incrimination as to specific questions before one examiner of the S.E.C., he answered questions without claiming the privilege before another examiner a year later.

2. Whether the court erred in refusing to direct government counsel to turn over to the defense the deposition of a third person for use in cross-examining a witness on the stand.

3. Whether the district court erred in denying petitioners' request to cross-examine and produce evidence in a post-verdict hearing on the mental competency of a co-defendant.

4. Whether the evidence was sufficient to support petitioners' conviction on the conspiracy count of the indictment.

5. Whether the court erred in its instructions on the substantive counts charging sales of unregistered securities.

6. Whether the evidence was sufficient to support the convictions on the substantive counts.

7. Whether government counsel was guilty of misconduct in his examination of witnesses.

STATEMENT

Petitioners (the corporate petitioner being wholly owned by petitioner Abrams) were convicted on a

number of counts charging use of the mails and the instrumentalities of interstate commerce in the sale of unregistered securities, *i.e.*, stock of the Automatic Washer Company ("Automatic"), and conspiracy to commit these offenses. Abrams was sentenced to concurrent terms of imprisonment for five years, and the corporation was fined $5,000. The evidence is discussed in considerable detail in the opinion below (Pet. App. O 2, 5–10), and we summarize briefly herein only the general nature of the scheme.

It is not disputed that the Automatic stock was not registered. The theory on which the government's case was submitted to the jury (see App. 305a–309a, 313a)[1] was that the stock should have been registered because petitioner Abrams and co-defendant Albert were "underwriters" under 15 U.S.C. 77(b)(11) in that they purchased from the issuer with a view to selling the stock to the public. The government's proof developed the background showing how the defendants acquired the stock as well as what they did with it after acquisition.

1. Acquisition of the Stock

Co-defendant Albert, who was in control of Bellanca Aircraft Corporation (Tr. 229–230), arranged to have Bellanca acquire N. O. Nelson, a plumbing supply concern, and its subsidiary, Joplin Supply Co. (Tr. 218–219, 339–354). Most of the money for this pur-

[1] "App." refers to the printed appendix; "Tr." refers to the transcript of the trial.

chase was obtained through a loan (Tr. 492–493)[2] which was refinanced in November by another loan of $3,600,000 (Tr. 508, 593–594, 9504). For this latter loan, the tangible assets of Nelson, which had a surplus, were pledged (Tr. 611, 620). It was anticipated that the loan would be repaid from Nelson's liquidation (Tr. 623–624).

The Automatic Washer Company, which in 1955 had 292,594 shares issued and outstanding, was listed on the Midwestern Stock Exchange. Its president, John Chamberlin, was interested in obtaining cash for the company, because he had developed an experimental model washer-dryer and was seeking to market it (Tr. 931–943). After two attempts to obtain financing had failed (Tr. 947–951), Chamberlin met petitioner Abrams, who undertook to discuss proposed financing with Albert (Tr. 943–954). Abrams pointed out that a purchase of Automatic stock by Albert in a private transaction would not require S.E.C. registration (Tr. 954).

On December 8, 1955, Albert, acting through a corporation which he controlled, agreed to buy 330,000 shares of Automatic original-issue stock at $2.55 per share (Tr. 956). The transaction was actually effected through the corporate petitioner ("Richland"), which kept 100,000 shares of the stock and transmitted 230,000 shares to Albert's corporation. (Tr. 1054, 9281–9282). This gave the two corporations control of Automatic. Albert then approved the

[2] Petitioner Abrams assisted in obtaining the first loan by guaranteeing up to $500,000 (Tr. 494–497).

board of directors suggested by Chamberlin (Tr. 1538, 1542, 9294–9295).

Abrams agreed with Chamberlin to receive 50,000 shares of Automatic stock as a finders' fee for arranging the above transaction. On December 22, he agreed to waive this fee if 50,000 shares of Automatic were delivered to Richland for rubber machinery Abrams assertedly owned as a result of an earlier transaction with Albert (Tr. 1000–1005, 1421–1426). The shares were given to Abrams in February 1956 (Tr. 1473), but no rubber machinery was thereafter delivered to Automatic (Tr. 1034–1035).

Shortly after the December 8 agreement, on about December 13, 1955, Abrams told Chamberlin that Bellanca owned a "fabulous piece of property"—*i.e.*, Nelson—which, as a plumbing supply house, would be a suitable adjunct for Automatic (Tr. 963–964). He did not tell Chamberlin about the pledge for the second loan (Tr. 964–965). A Dun and Bradstreet report, which Chamberlin obtained, was based on Bellanca's 1954 balance sheet, and it did not reflect the 1955 loan (Tr. 965, 1304–1305). On December 22, 1955, it was agreed that Automatic would issue more than a million shares of its stock to Bellanca for Bellanca's shares of Nelson (Tr. 967–970). Of these shares, 305,000 were to go to Albert personally in return for a note from Bellanca to Albert, allegedly representing a debt (Tr. 994–995). Abrams knew of the arrangement, computed the amount of the note, and drew it up for Albert to sign (Tr. 995–996, 1315–1316). The agreement was subsequently

modified because Nelson was to declare a dividend (Tr. 1008–1010, 9298) to be used to wipe out the 1955 loan (Tr. 9725).

Chamberlin was disturbed when, in January 1956, he learned about the loan (Tr. 1035–1036). When he told Abrams what he had learned, Abrams expressed surprise and said that he would speak to Albert (Tr. 1036–1038).[3] In February 1956 Chamberlin told Abrams that he would not complete the deal. Abrams later reported that Albert was going to fire Chamberlin but that Abrams had persuaded him to relent (Tr. 1042–1043). Under amended arrangements, Automatic received, in addition to the Nelson stock, 100,000 shares of Bellanca stock, and Albert agreed to lend $500,000 (of which only $100,000 was advanced) to Nelson (Tr. 1045–1048, 9725–9726).[4] The agreement was finally consummated on April 6, 1956 (Tr. 1050). Of the stock transferred to Bellanca, 50,000 shares were given to an agent for Abrams as a finders' fee (Tr. 9621–9623).[5]

On May 8, 1956, Bellanca agreed to sell more than a million shares of Automatic stock to Bankers Life

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[3] In February 1956, Abrams also expressed surprise when told again about the loan in the office of an attorney named Purcell (Tr. 9298–9299).

[4] It was during the negotiations with respect to the purchase of Nelson that Abrams wrote the letters noted in the opinion below (Pet. App. O 7–8) characterizing the Nelson deal as "robbery" against the Automatic stockholders (see App. 123a–130a).

[5] Those shares, which were sold through various accounts, were not the basis of the substantive counts on which Abrams was convicted.

& Casualty Co. and to cause Automatic to issue as many additional shares as were necessary to give Bankers Life 51% stock ownership (R. 1067). Bellanca delivered only 500,000 shares (R. 1078–1080, 1837, 9577–9578).

2. Sales by Petitioners

Petitioner Abrams sold Automatic stock in three different ways. In early 1956 he sold 7,000 shares to several friends at $3 a share with the representation that Automatic was a good stock (Tr. 745–758, 786–788, 2130–2139, 2998–3013). These were not the basis of substantive counts.

A number of the substantive counts in the indictment related to sales made through brokerage accounts at Hentz & Co. in the names of relatives and close friends of Abrams which were used as conduits for the sale of Automatic stock. The jury convicted on counts dealing with sales nominally made by a close friend, Eugene Carusi (Counts 2, 11),[6] and one Charles Gordon (Counts 17–25). Each of these accounts bought 1,000 shares which were sold in small lots.

More than 40,000 shares were sold directly through Montor and Company in August-October 1956—*i.e.*, after the Bellanca shares were sold to Bankers

[6] Although Carusi testified that he himself made the decisions to sell the stock (Tr. 2062–2067), there was in evidence a letter from him to Abrams dated June 4 (after the sales) saying that he had received several statements from Hentz & Co. which "make little or no sense to me" (Ex. 5–H—5, quoted at Tr. 11702–11703).

Life. In defense, Abrams offered evidence that these sales were made necessary by the defalcations of an associate who was deceased at the time of trial. The associate had, on October 24, 1956, signed a confession admitting the theft of $242,000 (Tr. 8548–8551, 9415, A. 618a), but his employment had continued after his alleged defalcations (Tr. 8554, 9424–9425). Abrams was convicted of substantive counts based on the sales through Montor.

ARGUMENT

At the conclusion of its extensive opinion, the court of appeals stated (Pet. App. O 22):

> The proof the appellants' guilt was overwhelming; the trial was fairly and scrupulously conducted. If anything the trial judge was too lenient in the latitude allowed defense counsel and too patient of repetitious arguments and maneuvers of defense counsel which had no merit and served only to lengthen unduly a trial which should not have taken so much time of the court and the jury. We find no error in this record and affirm the conviction.

None of the contentions made in the lengthy petition for a writ of certiorari casts any doubt on the validity of that conclusion.

1. The court below correctly held (Pet. App. O 14–17) that petitioner's testimony before an attorney of the S.E.C. did not immunize him because he was never compelled to answer after having claimed his privilege against self-incrimination. At an investigation of the Bellanca transactions held in New York

in June 1956, petitioner claimed the privilege against self-incrimination in response to most questions and answered only a few. Petitioner thereafter appeared with counsel, pursuant to subpoena, before the same examiner in October 1957. At that time, as the record explicitly discloses, the arrangement was entirely voluntary, and petitioner was accorded the right to refuse to answer any question on the ground of self-incrimination (see Pet. 56).

Petitioner's immunity contention is apparently based not on the October 1957 testimony, but on his appearance at an intervening investigation, commenced in April 1957, before a different S.E.C. attorney in Washington, D.C. The purpose of that investigation was to determine whether the registration of Bellanca stock on the American Stock Exchange should be suspended or withdrawn. Petitioner appeared with counsel in the course of that hearing in July 1957, and testified about various transactions proved at this trial (Pet. 53–54). Petitioner made no claim of privilege at that time. His argument that this testimony was "compelled" within the meaning of the immunity statute, 15 U.S.C. 77v(c), is plainly without merit. When called to testify in New York a year earlier, petitioner had shown awareness of the rule that the privilege against self-incrimination had to be invoked in response to specific questions, and he had chosen to answer some questions. His testimony a year later, in a separate investigation under different circumstances,[7] without mention of the privilege

[7] In an affidavit in response to petitioner's post-trial motions which raised *inter alia* the question of immunity, the govern-

can in no sense be deemed to relate to the prior specific claims of privilege. The situation here is different from that in *Smith* v. *United States*, 337 U.S. 137, on which petitioner relies, where, in the course of a single hearing, a witness (later the defendant) first said that he wished to claim the constitutional privilege as to anything he said and then answered questions put to him by the examiner.[8]

2. Chamberlin (the president of Automatic) was a government witness. At the conclusion of his direct testimony, pursuant to 18 U.S.C. 3500, the court directed government counsel to turn over to the defense depositions of Chamberlin obtained in civil proceedings arising out of the Bellanca-Automatic transactions. The court recognized, at the time, that this was not, strictly speaking, within the Jencks Act, but it nonetheless ordered disclosure. The court then emphasized that under consideration at that juncture

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ment submitted an affidavit of the examiner, Frederick Moss (App. 158a–160a), to the effect that, after expressing reluctance to testify in June 1957, petitioner, through his attorney, communicated with Moss and stated that he was willing to testify. The affidavit was submitted in reply to petitioner's post-trial motion, but it is not necessary to consider it to determine the question raised.

[8] There is no substance whatever to the argument that the Fifth Amendment prohibits Congress from conditioning immunity upon a specific claim of privilege (Pet. 63–64). This Court noted in *Smith* (337 U.S. at p. 148) that an immunity statute such as the one involved here puts the immunity "on a parity with the constitutional privilege against self-incrimination." Just as the constitutional right depends on specific invocation of the privilege, so may the statutory immunity require that the witness assert the privilege.

were only materials to be used to impeach Chamberlin and that a distinct issue was presented as to whether the defense was otherwise entitled to obtain other materials in government counsel's possession (Tr. 1135–1137). The court declined several times to order government counsel to transmit a deposition of Carmick (a vice-president of Automatic) for use by the defense in cross-examining Chamberlin (Tr. 1137–1141, 1568–1579, 1641–1642).[9] The court stated explicitly, however, that if the defense called Carmick or if it wanted the deposition for some other purpose, a ruling would then have to be made on the demand (Tr. 1641–1643).

The court said (Tr. 1642–1643):

> I want to make sure that you, Mr. Gottlieb, understand this rule. I think you do, but out of an abundance of caution I am going to express again that I don't mean to suggest that you are necessarily precluded from getting this even from the government, but not for the purpose which I understand this application to be directed, to wit, use of it for the cross-examination of the witness John W. Chamberlin.

Petitioners made no further attempt to obtain the deposition (Tr. 1640). Nor did they attempt to call Carmick as a witness. Indeed, petitioners' counsel specifically stated that he did not want to do so (Tr. 1139). On these facts, it is entirely clear (1) that the trial court properly held that Carmick's deposi-

[9] Petitioner had previously attempted to impeach Chamberlin by using letters written by Carmick which Chamberlin said he had not seen or had first seen long after the letters were sent (Tr. 1195–1199, 1437–1438).

tion could not be used in cross-examining Chamberlin and (2) that there was no suppression of evidence by the government.

The fact that Carmick, after verdict, wrote a letter expressing his personal opinion that Abrams was not guilty (App. 115a–119a) does not affect the merits of the district court's rulings. Carmick's personal views as to guilt or innocence, if admissible at all, could have been presented by the defense had they called him as a witness. Moreover, Chamberlin testified that Carmick was not a principal negotiator for the company (Tr. 1200). He was not the person who arranged the agreement by which Automatic, at the suggestion of Abrams, took over Nelson. Finally, his letter suggests no more than the government's evidence showed (see App. 123a–130a)—*i.e.*, that, after the initial deal was negotiated, Abrams tried to obtain better terms for Automatic on the sale of Nelson to Automatic. Notwithstanding his full knowledge of the "robbery," Abrams was already selling Automatic stock at the time he wrote his letters and he was well aware that Albert was doing so. He also continued to participate in the transaction closed in April 1956 and sold Automatic stock thereafter.

3. The circumstances which led to the holding of a competency hearing with respect to co-defendant Albert are set forth in the opinions of the district judge (Pet. App. O 23–36). The judge properly rejected petitioners' demand that they were entitled directly to participate in the hearing to the extent of examining and cross-examining witnesses and to offer

evidence as to Albert's competency on the ground that he failed "to see any reason in law or logic for permitting this kind of participation by others than the attorneys for the government and the defendant Albert" (Pet. App. O 27–28). He stated that he had directed that petitioners' counsel have access to all medical reports and other material that would relate to the competency issue, with suitable safeguards to protect the privacy of the defendant involved. He also stated that petitioners' representative could attend the otherwise closed hearing (Pet. App. O 28).[10] The question at issue was not Albert's competency at the time of the commission of the offense, which was not raised, but the altogether different question whether Albert was competent to stand trial under the standard of *Dusky* v. *United States*, 362 U.S. 402, *i.e.*, whether he could understand the charges against him and rationally assist counsel. This was personal to Albert, and such interest as petitioners could conceivably have had in the outcome was amply protected by the court's rulings.

Nor did the rejection of petitioners' demand to participate necessarily mean that the interests of petitioners and Albert were sufficiently separate to require a severance (see Pet. 47–50). All the defendants were acting together throughout the period when Bellanca took control of Nelson and Automatic and they arranged for Automatic to take over Nelson in such a

[10] In view of this ruling, it seems evident that, upon request, the judge would have made a transcript of the hearing available to petitioners' counsel, with suitable safeguards as to privacy.

way as to make shares available for public sale. They were therefore properly tried together. *Blumenthal* v. *United States,* 332 U.S. 539, 559; *Schaffer* v. *United States,* 362 U.S. 511, 514. And while it would surely have been permissible for the judge to direct that the case be tried partly to a judge and partly to a jury, it was also permissible to conclude that such a procedure was not desirable. The judge was not required to accept the offer of one or more defendants to waive a jury trial. *Singer* v. *United States,* 380 U.S. 24.

4. The evidence underlying the conspiracy count—which, if valid, supports petitioners' total sentence—was, as the court of appeals held, overwhelming. The conspiracy clearly continued, at the very least, until May 8, 1956 (when Bellanca sold Automatic shares to Bankers Life),[11] and petitioner Abrams then participated therein, receiving 50,000 shares at the time of the April 6, 1956, execution of the agreement between Automatic and Nelson. The fact that petitioner, in his March letters, expressed the view that Automatic stockholders were being "robbed" and that he would prefer terms different from those he had first arranged did not prevent him from assisting in the final negotiations or going ahead with the sale of stock. Nor could the jury have been confused by the instruction that, although the first count had been dismissed for technical reasons, it might consider the evidence

[11] While the judge did not charge on the statute of limitations as such with respect to the conspiracy count, he did point out the conflicting contentions of the government and the defendants with respect to the period after May 8 (App. 374a–375a). See p. 16, *infra.*

with respect thereto on the conspiracy count (App. 300a). Proof of sales to the public in February and March 1956 obviously had an important bearing on the issue of petitioners' intent, and it was proper for the court so to instruct.

The contention that it was error for the government to prove the circumstances of the Nelson acquisition and loans (Pet. 126–135) is, as the court below held (Pet. App. O 10–11), without merit. The trial judge did limit the proof on other matters, as petitioners themselves note (Pet. 127, n. *). It was, however, clearly relevant to the issue of whether petitioners acted knowingly to show that they might be reluctant to register Automatic stock in view of the earlier manipulations with respect to Nelson which would have to be disclosed by such registration. In view of the long investigation which preceded the indictment, petitioners can hardly claim to have been caught unaware by the government's theory that these manipulations were involved in the question of non-registration.

5. In view of the sufficiency of the evidence with respect to the conspiracy count, the issues raised by petitioners with respect to the substantive counts cannot affect the validity of the judgments of conviction.[12] They are, in any event, without merit.

A complete reading of the judge's careful, balanced charge to the jury (App. 291a–386a) refutes petition-

[12] The offense charged in the substantive counts was the illegal use of the mails in the sale of an unregistered security. Hence, contrary to petitioners' contention (Pet. 119–122), the district court properly refused to consolidate all the substantive counts. See 29 F.R.D. 178, 180.

ers' attack thereon. It is true that the judge did not, in so many words, charge the jury on the statute of limitations with respect to the substantive counts based on the alleged "nominee" accounts (see Pet. 73–83). But he presented the relevant issue in much more meaningful terms. After noting that the Automatic stock was acquired by the nine nominee accounts in mid-March 1956, he stated correctly that it was not these acquisitions which constituted the unregistered sales. He noted that, under the prosecution's theory, the government was required to establish beyond a reasonable doubt that petitioners "controlled and manipulated [the accounts] for the purpose of making the later sales out of the accounts to members of the public in April, May, June and July, 1956" (App. 328a–329a). Hence the issue which controlled the statute of limitations question was fully presented to the jury.

The issue of whether guilt could be predicated on the sales of stock through Montor—*i.e.*, whether petitioner Abrams had originally taken the stock for investment, and not for sale, but was forced by change of circumstances to sell (see Pet. 93–113)—was properly placed before the jury in clear and understandable terms (App. 329a–330a). The judge had previously pointed out that no defendant could be guilty of the substantive crime unless the jury found that he was an "underwriter," a term which he defined (App. 304a–305a), and that the defendant sold or assisted in selling stock to the public (App. 305a). The judge specifically instructed that a sale to a small

group for investment was not a violation (App. 306a). He also charged that one who initially acquired stock in good faith for investment could, if he later suffered personal financial reverses, resell to the public without becoming an underwriter (App. 308a). He also, however, properly instructed that, if a defendant purchased as an underwriter with the intention of selling to the public, the fact that he later suffered a change in circumstances would not keep him from being guilty as an underwriter (App. 307a–308a, 375a).

The judge also gave proper instructions on intent (App. 313a–320a). He specifically explained to the jury that the defendants were not on trial for looting Nelson, but that the history of its financing was relevant insofar as it bore on the knowledge and intent of the defendants (App. 372a–373a). When, however, the jury asked specifically for the four elements of the offense (App. 430a, 479a)—one of which was that defendants, knowing that the stock was required to be registered, willfully sold stock to the public—the court was not required, as petitioners in effect argue (Pet. 86–90), to repeat all aspects of its charge. *United States* v. *Schiller,* 187 F. 2d 572 (C.A. 2).

6. There is no merit to various claims made by petitioners which constitute, in effect, an attack on the sufficiency of the evidence supporting convictions on the substantive counts.

a. The fact that, with respect to the nine nominee accounts, the jury acquitted as to a number of sales from accounts in the names of close relatives does not

affect the validity of convictions on other counts (Pet. 69–82) because consistency in a jury verdict is not required. *Dunn* v. *United States*, 284 U.S. 390. The jury, which sent for the June 4 letter of Mr. Carusi (App. 432a), may well have felt that his expressed mystification in June as to the handling of his account showed more clearly than did evidence pertaining to other accounts that the Carusi account had been used by Abrams as a means of selling stock to the public.[13]

b. Contrary to petitioner's contention (Pet. 73–83), the discussion in the record shows that the court was not confused as to the Gordon accounts (Tr. 7655, 7661–7664, App. 429a). The blotter of Hentz & Co. showed the certificate set forth in the bill of particulars (TCU–747) as being from the Gordon account (see Tr. 7659). Petitioners' claim of confusion stems from the fact that there is a letter from petitioner Richland, dated March 9, 1956, showing a certificate of that number being forwarded to Edna Gwasdow (DAR–AM; see Tr. 7655). There is also another letter, dated March 13, 1956, showing Richland sending the same certificate to Robert Berk of Hentz & Co. (DAR–CB). The alleged "confusion" merely tends to bolster the government's theory that the accounts were used by Abrams. The fact that the case was severed as to Gordon clearly did not preclude the jury from find-

[13] Carusi, although not a relative, was a personal friend of Abrams for fifteen years (Tr. 1990–1991). The court could therefore properly characterize him, as it did the members of Abrams' family, as a court witness for whom the government was not required to vouch.

ing that petitioners had manipulated an account in his name.[14]

7. Petitioner's allegations of government misconduct deal largely with the nominee accounts. The charges are totally unjustified.

a. Mrs. Gurland, who had lived with the employee of Abrams who confessed to the alleged defalcations, testified that she knew nothing about an account in her name through which five hundred shares of Automatic stock were bought and sold. As petitioners note (Pet. 136–140), she identified her signature on the card opening the brokerage account, but did not recall signing it. She denied signing the endorsement on a check received from the brokerage company, although the government later stipulated that the signature was hers. She also denied attending the opening of the employee's vault although an attorney testified that in 1957 she and Abrams had attended and the books had been turned over to Abrams. The court properly refused to strike her testimony. The issue of credibility—whether she had genuinely forgotten

[14] The question whether Albert was in control of Automatic after the May 8 sale to Bankers Life (Pet. 122–125) is not relevant if petitioners originally took the stock as underwriters. As for the report of the Midwest Stock Exchange after the May 8 sale (see Pet. 113–119), the government acknowledged the authenticity of the document, but did not concede that the document, which was a conclusory collection of hearsay statements and reports of past investigations, could qualify as a business record under 28 U.S.C. 1732. See *Palmer* v. *Hoffman*, 318 U.S. 109. Since petitioners did not undertake to establish the business nature of the document, the court was not called upon to rule on its admissibility.

these matters or was concealing evidence—was for the jury.

b. Although the court of appeals found "no error whatsoever in the government's treatment of defense witness Robert Berk" (Pet. App. O 21) and condemned "groundless charges" against officers of the court (Pet. App. O 22), petitioners repeat their insinuations in this respect (Pet. 140–143). The allegations are totally unfounded. At a preliminary hearing on a defense request that he be called as a court witness (Tr. 8295), Berk testified that he had no fear of retaliatory action by any government agency (Tr. 8300) but would rather not testify against the government (Tr. 8301). He was told to tell the truth (Tr. 8302).

Berk then testified that as to the nine family-friend accounts the orders to sell would have been, in accordance with general practice, issued by the particular individuals involved, and he remembered dealing with some of such individuals (Tr. 8311–8319, 8328–8335, 8358–8360, 8364, 8368–8369, 8381). A Christmas recess interrupted his cross-examination (Tr. 8739).

When the trial resumed, Berk testified that he could not remember who had placed the orders on the accounts (Tr. 8757). Government counsel then asked whether, on an intervening Saturday, Berk had not appeared at counsel's office with two attorneys and stated that Abrams had placed the orders (Tr. 8757). At a hearing outside the presence of the jury, counsel stated that at the conclusion of Berk's testimony before the recess, Berk approached government counsel.

One of defense counsel was also present but he was told that Berk wanted to talk to government counsel alone. Berk then was told by government counsel to retain his own attorney (Tr. 8763–8765; see also Tr. 8948–8949). He thereafter came to government counsel's office on a Saturday with two attorneys of his own selection (Tr. 8765). After listening to counsel's relation of these events, the court deferred ruling on the scope of permissible examination in this regard until after the witness had testified (Tr. 8785).

The witness then again testified in open court that he could not say who initiated the orders on the accounts (Tr. 8791). He was asked and admitted that on the previous Saturday, he had said that Abrams had placed the orders (Tr. 8797, 8807, 8867), but, on the stand, he denied the truth of that statement (Tr. 8799, 8810, 8867–8869). He explained that when first asked about the matter at the Saturday interview, he had said that he did not know, and government counsel had thereupon told him that he and his attorneys might as well go home. Afterward, his attorney had told him that the government wanted him to say that Abrams had placed the order, and he therefore said so (Tr. 8944–8946). He admitted that at the outset of the conversation, he was asked if he had consulted with counsel (Tr. 8954), and that no one was present when he talked with his own attorney (Tr. 8955).

After an extended colloquy outside the presence of the jury (Tr. 9048, 9131), the judge refused to permit government counsel to ask the witness what the

attorneys who had accompanied him to the conference had said to him (Tr. 9131). These circumstances do not support petitioners' allegations of misconduct, and the manner in which the witness' testimony was treated by the district court was eminently fair.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a petition for a writ of certiorari should be denied.

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JUNE 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966